U.S. Department of Labor

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Issue Date: 25 February 2003

Case No.: 2002-LHC-1811

OWCP No: 5-113086

In the Matter of:

KEVIN K. RICHARDSON
Claimant,

v.

VIRGINIA INTERNATIONAL TERMINALS
Employer.

Appearances:
Gregory E. Camden, Esq., for the Claimant
F. Nash Bilisoly, Esq., for the Employer

Before:
Daniel A. Sarno, Jr.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 et seq. ("the Act"). Kevin K. Richardson ("Claimant") sought compensation for an injury sustained in the course of working for Virginia International Terminals ("Employer"). A formal hearing was scheduled in this matter for December 10, 2002 in Newport News, Virginia. However, by conference call, the parties notified the ALJ that they had reached an agreement regarding the facts. The sole issue remaining before the court was the calculation of Claimant's average weekly wage. On December 3, 2002, the parties appeared before the ALJ. As this is purely a question of law, no witnesses were heard; the parties submitted stipulations and exhibits ("CX").[1]

Both parties submitted post-hearing briefs. Claimant contended that he was a five-day worker who worked substantially during the one-year period prior to his injury. He thus argued that his

[1]CX refers to the exhibits submitted by Claimant; however, Employer noted in its brief that "[a]lthough denominated as Claimant Exhibits, they were stipulated to as being accurate and are, thus, properly both Claimant and Employer Exhibits. As indicated at the hearing, both parties argue that the same exhibits support each party's case." (Employer's Brief at 2, note 1).

average weekly wage should be calculated based on § 10(a) of the Act. Claimant stated that, according to § 10(a), his average weekly wage should be $1,542.65.

Employer contended that, based on Claimant's wage and work records for the one-year period preceding his injury, Claimant worked only 27% of his time as a five-day worker. According to Employer, § 10(a) would result in a greatly inflated income, thereby rendering its application unreasonable and unfair. Rather, Employer contended Claimant's average weekly wage should be calculated pursuant to § 10(c) of the Act. Employer stated that, according to § 10(c), Claimant's average weekly wage should be $1,281.58. Thereafter, Employer submitted a Reply Brief in which it discounted Claimant's reliance on *Matulic v. Director, OWCP*, 154 F.3d 1052 (9th Cir. 1998)

The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

Employer and Claimant stipulated to, and I find the following facts:

1. There existed an employer/employee relationship at all relevant times.

2. The parties are subject to the jurisdiction of the Act.

3. Claimant suffered an injury to his back, neck, and left shoulder on December 21, 2001 arising out of the course of his employment.

4. A timely notice of injury was given by Claimant to Employer.

5. A timely claim for compensation was filed by Claimant.

6. Employer filed a timely First Report of Injury with the Department of Labor and a timely Notice of Controversion.

7. Employer alleges an average weekly wage of $1,281.58 resulting in a compensation rate of $854.38.

8. Claimant has been paid benefits as documents on the LS-208 dated August 14, 2002.

ISSUE

Whether Claimant's average weekly wage should be calculated according to Section 10(a) or Section 10(c) of the Act.

FINDINGS OF FACT

Claimant was injured on December 21, 2001 while working for Employer. He was operating a chassis stacker when a tractor trailer truck struck him in the back, injuring his neck, back, and left shoulder. Claimant was treated by Dr. Sidney Loxley. He was paid temporary total disability in the amount of $854.38 a week based on a average weekly wage of $1,281.58. (CX 7)

Claimant's work and wage records were submitted to the court. (CX 1, 2, 4-7) The evidence shows that Claimant was a full-time worker with Employer and he had worked substantially the whole year preceding his injury. (CX 4) He worked exclusively for Employer. (CX 6) The detail work records show the exact days and number of hours per day that Claimant worked. This reveals that in the 52-week period from December 22, 2000 to December 21, 2001 Claimant worked a total of 210 days.[2] (CX 6) Out of the 52 weeks, he worked 26 "4-day" weeks, 1 "six-day" week, 13 "5-day" weeks, 10 "3-day" weeks, and 2 "2-day" weeks.[3] Thus, Claimant had an average work week of 4.03 days per week for the year preceding his injury. The wage records show Claimant's gross earnings. During the year preceding his injury, Claimant earned a total of $52,676.50 in wages, an additional $5,408.00 in vacation and $8,557.42 in container royalty payments, for total earnings of $66,641.92. (CX 1)

CONCLUSIONS OF LAW

Sections 10(a), 10(b), and 10(c) provide three alternative methods for determining a claimant's average annual earnings, which are then divided by 52, pursuant to § 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992).

Section 10(a) is the statutory provision relevant to a determination of an employee's average annual wages where an injured employee's work is regular and continuous. It provides:

> Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

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[2]Although Claimant's brief states that he worked 216 days in the year preceding his injury, the court is uncertain how this number was reached. In addition, Employer's reply brief re-calculated the number of days worked and reached 208. However, upon careful review of the wage records and Employer's summary, it appears that Employer incorrectly omitted April 10, 2001 and June 16, 2001 from its calculations. Therefore, the court will rely upon its own analysis of the detail work records submitted into evidence and base its conclusions upon the fact that Claimant actually worked 210 days in the measuring year.

[3]This totals 209 days. The weekly breakdown does not include the day worked on December 22, 2000, as it was the last day of a week which is not included in the measuring year.

> (a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary fo a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

33 U.S.C. § 910(a).

Claimant argues that the correct formula is found in § 10(a). Claimant further asserts that he qualifies as a five-day worker under the Act. Therefore, he argues, his average weekly wage should be calculated by dividing his total earnings ($66, 641.92) by the number of days that he worked (216)[4], yielding an average daily wage ($308.53). The average daily wage, according to Claimant, should then be multiplied by 260 (standard statute year for five-day worker), and the product divided by 52 (weeks per year), to result in an average weekly wage of $ 1,542.65.

The court cannot accept Claimant's calculation of average weekly wage, because it is based on the erroneous premise that Claimant is a "five-day worker." Claimant asserts that the evidence shows that he "primarily worked five days a week." To the contrary, analysis of the wage statement on which Claimant relies reveals that Claimant only worked five days per week during 13 of the 52 weeks, or 25% of the relevant period. Of the remaining 39 weeks, Claimant worked 1 six-day week, 26 four-day weeks, 10 three-day weeks, and 2 two-day weeks. Thus, Claimant worked 4 or less days per work week 73% of the measuring year.

Throughout this time, it is undisputed that Claimant was a full-time worker who worked substantially all of the measuring year. Claimant's work schedule seemed to vary such that some work weeks he worked less than 40 hours, whereas other work weeks, he worked more than 40 hours by working multiple shifts and overtime hours. There is nothing in the record to suggest that Claimant was opposed to this type of work schedule.

Calculations under § 10(a) are theoretical approximations of what the employee could ideally be expected to earn, ignoring time lost due to strikes, illness, personal business, etc. *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990). There is no evidence that Claimant's failure to consistently work a five-day work week resulted from illness, personal business, or any other cause that prevented him from working as much as he may have desired. Rather, it is apparent that Claimant's schedule, whether by his choice or Employer's, was designed to accommodate shifts longer than a standard 8-hour day. Claimant often worked a full-time schedule over the course of a three or four-day work week. Seventy-three percent of his work weeks (39 our

[4]The court notes that Claimant's calculations are based upon Claimant having worked 216 days in the measuring year. As previously stated, the court has determined that, based upon the detail work history, Claimant worked 210 days in the measuring year. As warranted, adjustments will be made accordingly.

of 52) consisted of only two, three, or four days. During the fifty-two weeks that he actually worked, Claimant averaged 4.03 days per week (210 days divided by 52 weeks). However, the number of days per weeks that he actually worked was highly variable. It would, therefore, be wrong to consider Claimant to have been a five-day worker who simply missed a large number of days. As § 10(a) necessarily applies to either six-day or five-day workers, its use in this case is not warranted.

Even assuming, *arguendo*, that § 10(a) is not prohibited on its face, its use remains inappropriate, as it will result in gross overcompensation to Claimant, thus it does not provide an average weekly wage that reflects Claimant's actual earning capacity at the time of the injury. The Board has held that § 10(a) should not be applied where application "would yield an unfair and unreasonable approximation of claimant's annual wage earning capacity." *Gilliam v. Addison Crane Co.*, 21 BRBS 91, 93 (1987); *Lozupone v. Lozupone and Sons*, 12 BRBS 148, 156-57 (1979).[5] Similarly, the DC Circuit has held that

> it is not reasonable or fair to apply subdivision (a) or (b) when to do so would result in ascertaining a mere theoretical earnings capacity, having no regard to the actual facts of the case, but which would award arbitrarily to an injured laborer disability compensation in excess of what he was able to earn if at work, as shown by earnings.

Johnson v. Britton, 290 F.2d 355, 359 (D.C. Cir. 1961); *see also Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336, 1342 (9th Cir. 1982), *vacated and remanded on other grounds*, 462 U.S. 1101 (1983), *decision after remand*, 713 F.2d 462 (9th Cir. 1983) ("even if the worker's employment is permanent and continuous, computation of the average annual wage must be determined pursuant to subsection (c) if (a) or (b) cannot reasonably or fairly be implied . . . This can occur . . . when such computation results in excessive compensation of the claimant in light of the injured worker's actual employment record.") (citations omitted).[6]

The facts of this case also show that Claimant's work was permanent and continuous, he worked substantially the whole of the year preceding his injury, and there is sufficient evidence in the record to support the presumption that § 10(a) should be applied in this case. Thus, subsection (a) is initially appropriate. However, it is equally clear that its application bears little regard to the actual facts of the case. The theoretical computation under subsection (a) results in excessive compensation

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[5]In *Lozupone*, the determination of claimant's annual earnings pursuant to § 10(a) would have resulted in a figure almost $7,000 more than his actual earnings during the preceding year. The Board found that application of § 10(a) yielded unfair and unreasonable results by distorting claimant's annual earnings. Therefore, the Board determined that claimant's average weekly wage should be calculated pursuant to § 10(c). *Lozupone*, 12BRBS at 155.

[6]In *Duncanson-Harrelson*, the Ninth Circuit found that the claimant's work was permanent and continuous and he had worked substantially the whole of the year immediately preceding his injury, thus his benefits initially should have been determined under subsection (a). However, the court affirmed the ALJ's application of subsection (c) because subsection (a) would provide excessive compensation to the claimant. *Duncanson-Harrelson*, 686 F.2d at 1341-42.

to Claimant in light of his actual employment record. This renders the use of subsection (a) unfair and unreasonable. Here, § 10(a) would result in average annual earnings for the measuring year of $82,508.40. This is $15,866.48, or 24%, more than Claimant actually earned in the year prior to his injury. Thus, if Claimant's average weekly wage were to be calculated under § 10(a), certain factors which affected Claimant's pre-injury wage-earning capacity, such as the fact he performed shift work and was not expected to work every working day, would not be accounted for. The average weekly wage calculation thus would not reflect what Claimant would have earned had he continued to work for Employer absent injury. Therefore, the result under § 10(a) is unfair and unreasonable, as Claimant's actual annual earnings are more accurate than a theoretical approximation of his earnings capacity.

Claimant, however, contends that some measure of overcompensation is acceptable when applying § 10(a). It is true that application of § 10(a) provides merely an approximation, thus it can distort the projection of annual earnings beyond the amount which he could actually have earned at his job had he not been injured. The Ninth Circuit has acknowledged that some "over compensation" is built into the system institutionally. *Matulic v. Director, OWCP*, 154 F.3d 1052 (9th Cir. 1998) ("virtually no one in the country works every working day of every work week."). The Ninth Circuit therefore opined that whether the amount of overcompensation is acceptable is a "question of line-drawing" and held that there is a presumption that § 10(a) is applied to a five-day worker when a claimant works more than 75% of the workdays during the measuring year.

However, as Employer correctly noted in its Reply Brief, *Matulic* is not controlling, nor applicable in this case. In *Matulic*, the issue was whether the claimant had worked substantially all of the year preceding his injury; the court did not address whether claimant was a five or six-day worker.[7] The court's opinion was therefore premised on the assumption that claimant was indeed a five (or six) day worker. Conversely, as noted above, in this case, Claimant cannot be classified as a five (or six) day worker. The case also differs factually from the present case in that Matulic missed several weeks of work due to personal reasons, i.e., he moved to another state and thus needed time to transition to his new home. This is the type of situation envisioned by Congress, as noted by the *Duncanson-Harrellson* court, that "there are many reasons including illness, vacation, strikes, unemployment, family emergencies, etc." for an employee to work less than 260 days annually. *Duncanson-Harrellson*, 686 F.2d at 1342. However, here, Claimant worked significantly less than 260 days, as was simply the nature of his employment. Thus, the *Matulic* reasoning that some overcompensation is acceptable, as most employees do not work every possible work day, is not applicable here.

Furthermore, *Matulic* was decided in the Ninth Circuit; this case arises under the Fourth Circuit. Less than one month prior to the Ninth Circuit's decision in *Matulic*, the Fourth Circuit noted, in *Universal Maritime Service v. Wright*, 155 F.3d 311 (1998), that "§ 10(c) explicitly recognizes that the mechanical formula for benefit computation [in § 10(a)] must be disregarded

[7]The Ninth Circuit found that because the claimant had worked more than 75% of the available work days, he worked during "substantially the whole of the year" and applied § 10(a).

where the formula would distort a claimant's actual earning capacity."[8] *Wright*, 155 F.3d at 327 (citations omitted). While factually divergent, the court's decision informs that in the Fourth Circuit, § 10(a) is not appropriate where it yields an annual earning capacity that is not consistent with the claimant's actual annual wages prior to injury. Accordingly, the Ninth Circuit's decision in *Matulic* is not persuasive as applied to this case.

Because § 10(a) is reserved for either five or six-day workers, and its application would distort Claimant's actual annual earning capacity by overcompensating Claimant, its use in the present case is inappropriate. The court thus turns to the application of § 10(c) to calculate Claimant's average weekly wage.

Section 10(c) provides for a situation in which § 10(a) and § 10(b) "can not reasonably and fairly be applied."[9] In such a case, the statute provides:

> (c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the seasonable value of the services off the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. § 910(c).

Section 10(c) is a general, catch-all provision that may be used where § 10(a) or § 10(b) would result in overcompensation to the claimant, and therefore do not yield an average weekly wage that reflects the claimant's earning capacity at the time of the injury. *Duncanson-Harrelson*, 686 F.2d at 1342; *Lobus v. I.T.O. Corp.*, 24 BRBS 137, 139 (1990); *Gilliam*, 21 BRBS at 93 (section 10(c) is applicable in cases where the application of subsection (a) or (b) "would yield an unfair and unreasonable approximation of claimant's annual wage-earning capacity); *Lozupone v. Lozupone & Sons*, 12 BRBS at 156-57. The objective of § 10(c) is to reach a fair and reasonable approximation of the claimant's annual wage-earning capacity at the time of the injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 823 (5th Cir. 1991); *Richardson v. Safeway Stores*, 14 BRBS 855, 859 (1982). That amount is then divided by 52, in accordance with § 10(d), to arrive at the average weekly wage.

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[8] I*n Wright*, because the amount of claimant's actual wages at the time of his injury could not be determined, the calculation of his average weekly wage under § 10(a) was not feasible.

[9] Both parties agree that § 10(b) would be inappropriate in this case because Claimant worked substantially the entire year for the same employer.

Due to the irregular nature of Claimant's hours from week to week, it would be misleading to characterize Claimant simply as a five-day, or even a four-day worker.[10] The most rational way to calculate Claimant's earning capacity is, in fact, exactly the one Employer has chosen. Employer has looked to Claimant's actual earnings to determine an appropriate average weekly wage, diving Claimant's total earnings by 52, an approach that Board has approved in other § 10(c) cases. *Gilliam*, 21 BRBS at 91; *Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989). Therefore, the court approves of Employer's calculation of average weekly wage.

CONCLUSION

After full consideration of the record, it is the opinion of this court that § 10(c) is appropriate to calculate Claimant's average weekly wage and, dividing his actual earnings ($66, 641.92) by 52, results in an average weekly wage of $1,281.58, with a resulting compensation rate of $854.38.

ORDER

It is hereby **ORDERED** that:

1. Employer shall pay Claimant permanent total disability compensation at a rate of $854.38 per week.

2. Employer shall receive credit for any benefits previously paid to Claimant.

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Daniel A. Sarno, Jr.
Administrative Law Judge

DAS/LLT

[10]In fact, treating Claimant as a four-day worker would yield a slightly lower compensation rate than he has actually received. While there are 208 work days in the year for a four-day worker, Claimant actually worked 210 days, and Employer has calculated compensation on this basis.